

3.
January 28. 1766.

Unto the Right Honourable the Lords of Council and Session,

The PETITION of *John Bulman*
Attorney in *Morpeth*, Administrator of
James Aitkenson,

Humbly sheweth,

THAT the petitioner, upon the title of Letters of Administration, dated the 11th of *January 1762*, under the seal of the Vicar-general, and Official-principal of *Durham*, and as constituted administrator of *James Aitkenson*, late attorney in *Morpeth*, brought an action, setting forth, " That in the year 1760 the Lord *Gairlies* having offered himself as a candidate to represent the borough of *Morpeth* in parliament, and being desirous to intrust the management of his election to a person properly acquainted with the constitution of the borough, and the different freemen, and their qualifications, he made choice of the now deceased *James Aitkenson* attorney in *Morpeth* for managing this affair; which choice the Earl of *Galloway*, his father, was pleased to approve of and confirm by several letters, holograph of his Lordship, addressed to Mr *Aitkenson*: That for above the space of a year, during which Mr *Aitkenson* had the whole management of this election for Lord *Gairlies*, which was sharply contested, there being several other candidates, he applied himself with such diligence and assiduity to this affair, that he entirely neglected his other business as an attorney, which was very considerable, and, in the end, carried the election for Lord *Gairlies*, and procured him a seat in parliament, contrary to the expectation almost of every person, and soon after died, the fatigue of this business not a little contributing to his death, which happened before settling the accounts of his disbursements in carrying on and

A

" managing

“ managing the said election, or his receiving any gratifica-
 “ tion for his trouble and loss of time in that affair: That the
 “ said *John Bulman*, the pursuer, having been appointed admini-
 “ strator of the said *James Aitken*, the accounts between
 “ the said Earl and Lord *Gairlies* and *James Aitken* for his
 “ debursments came to be cleared and settled by the pursuer,
 “ in which accounts he gives their Lordships credit for the mo-
 “ ney received, and debits them only with the money expend-
 “ ed, without making any charge for Mr *Aitken*’s agency
 “ and trouble in managing the election; and in *January 1762*
 “ the said Earl having paid the pursuer the balance of deburse-
 “ ments due by the said account, the pursuer discharged him
 “ of the whole articles thereof. That, after this clearance, the
 “ pursuer expected that the said Earl and Lord *Gairlies* would
 “ make some grateful and adequate return to Mr *Aitken*’s
 “ heirs, suitable to the great pains and trouble he had been at
 “ as their agent and attorney in managing the said election;
 “ but their Lordships silence on this head for above a twelve-
 “ month after the said clearance, obliged the pursuer to make
 “ a demand on them for this article: but having received an
 “ absolute refusal to grant or allow any gratification for Mr
 “ *Aitken*’s trouble in the said affair; wherefore the said
 “ Noble Lords should be decerned and ordained to make pay-
 “ ment to the pursuer, as administrator foresaid, of the sum
 “ of *L. 500 Sterling*, in name of agency, and for the said *James*
 “ *Aitken*’s trouble, loss of time, and fatigue in managing the
 “ said Lord *Gairlies* his election, and of *L. 100 Sterling* as the
 “ expences of process.”

That the defences in substance were, *1mo*, A denial of the
 libel, that Mr *Aitken* was employed as attorney. *2do*, That,
 as *negotiorum gestor*, he was not intitled to a recompence. Nor,
3tio, Although he had been employed as attorney, because he
 acted entirely from a public spirit, and on an independent foot-
 ing. *4to*, That the pursuer, by sitting an account with the
 Earl of *Galloway*, is effectually barred from this claim.

That

That this cause having been taken to report, your Lordships, of this date, pronounced the following interlocutor: " Upon Jan. 16.
1766.
" report of the Lord President, in place of Lord *Alemoor*, the
" Lords sustain the defence, assoilzie the defenders, and decern."
And the petitioner begs leave to reclaim.

That the merits of this cause were fully set forth in the informations lately under the deliberation of the Court. It will therefore be improper to enter minutely into the various points therein mentioned. The petitioner will confine the present application singly to that point which appeared to have the greatest weight when the above interlocutor was pronounced. The present question turns entirely upon the relevancy, whether action is competent for the agency of Mr *Aitkenson*. And as the condescendence formerly given in was too general, leaving a blank of many months from Mr *Aitkenson's* being first employed by the defenders as *agent, attorney, and manager*, at *Kelfo*, in *June 1760* to *April* thereafter, the time of the election of a member of parliament for *Morpeth*, it did not appear *medio tempore* that there had been any proper employment as attorney, though a great deal of business done by him as a manager of the defenders, which last was not thought of itself sufficient to sustain the present action; and it is believed that the above interlocutor went upon that ground.

To remove, in some measure, the above generality, which will entirely be done when the proof is granted, the petitioner begs leave to condescend and say,

1mo, That, by the universal practice in *England*, attorneys are employed in contested elections, and entitled to fees, as being engaged in a branch of their profession; and that it is not usual to stipulate any particular sum, or to make an article in an account, for such agency; that, for the most part, being left to the generosity of the employer.

2do, That Mr *Aitkenson* was employed as attorney, agent and manager for Lord *Gairlies* at the said meeting in *Kelfo*, and the said employment accepted of, and executed.

3tio, That

3tio, That when Lord *Gairlies* proposed himself a candidate to represent *Morpeth* in parliament, it was absolutely necessary to fall in with this practice, and to employ an attorney as his agent and manager. This will appear from the following considerations: 1mo, Lord *Gairlies* was an absolute stranger in the borough, residing in *Scotland*, and rarely in *Morpeth*: 2do, He had to oppose the family of *Carlisle*, and the whole county and neighbourhood: 3tio, From the state of the freemen of *Morpeth*; many of them being in such distressed circumstances at that time, that the opposite party took the advantage of it, and used all their influence on their creditors to put them to trouble. Such freemen who were engaged for Lord *Gairlies*, were put by his Lordship under Mr *Aitkenson's* protection, as an attorney to defend their several causes, in order to procure their votes. Accordingly he acted for them as an attorney; and, without his acting as such, Lord *Gairlies* could not have carried his election. This will appear by the following among other particulars, which can be proved:

1mo, One *James Hanway*, a freeman who voted for Lord *Gairlies*, had been excommunicated for several years, by one Mr *Bulman* deceased, for defamation. As Mr *Bulman* was dead at the time of the election, it was thought advisable to have that excommunication taken off, in order the better to entitle *Hanway* to vote. Mr *Aitkenson*, as an attorney, applied to his agent, one Mr *Wheeler*, a proctor in the Ecclesiastical Court of *Durham*, and got it taken off previous to his voting; and Mr *Aitkenson* paid Mr *Wheeler* for this business L. 3. 4 s. which is included in the account settled with Lord *Galloway*.

2do, It was thought advisable, at the death of a bailiff who died in his office, to elect a new one in his room before the time that the two bailiffs are annually chosen. *Gabriel Dun*, one of Lord *Gairlies's* voters, was pitched on for that purpose; but as he was opposed by the *Carlisle* family, (who wanted the returning officer to be in their interest), and threatened to be prosecuted, &c. Mr *Aitkenson* wrote to and received answers from

from Lord *Galloway* on this subject; upon which it was resolved that Mr *Dun* should stand; and several Common Guilds were called, where Mr *Aitkenson* attended, and explained to the several freemen the nature of the affair, and drew a bond of indemnity from the aldermen of the several companies to Mr *Dun*, and also bonds from the members of the several companies to their respective aldermen; and, moreover, drew a state of the case, and had counsel's opinion thereon. The trouble attending this business was very great, and answered a good purpose to Lord *Gairlies*.

3tio, One *Thomas Gayer*, a freeman in goal, promised his vote to Lord *Gairlies* if he was at liberty. A bill in Chancery being filed, to have *Gayer's* estates in mortgage foreclosed, and he not putting in his answer thereto, he was confined, by virtue of an attachment, for contempt. Mr *Aitkenson* had a great deal of trouble in this matter, and his agent charges him near 40 Shillings for attendance, &c. upon Lords *Galloway* and *Gairlies*, when in *London*, upon it. The gentleman to whom *Gayer* owed the money lived twenty miles from *Morpeth*, and his attorney at near the same distance: Mr *Aitkenson* waited upon them at different times, to make the matter up, and offered them 400 guineas to discharge Mr *Gayer* and assign over the securities, which they then agreed to accept. After this agreement was made, the attorney for *Gayer's* creditors was influenced (as supposed) by the opposite party, and refused to ratify the bargain. Mr *Aitkenson*, in order to carry his point, went to the High Sheriff, near thirty miles distance, he having power to take the money and discharge him, which he refused. Being thus disappointed, Mr *Aitkenson* applied for a writ of *Habeas Corpus*. The charge for the *Habeas Corpus* was made in the accounts fitted, but nothing for Mr *Aitkenson's* trouble.

4to, One *John Charter*, a freeman, who had failed in his business about twelve years before the election, and was reduced to charity, he having promised his vote for Lord *Gairlies*, the opposite party influenced one of his creditors to arrest him,

and put him in goal, to deprive him of voting. Mr *Aitkenfon* bailed him, and defended the action, *Charter* declaring the debt was not just: Mr *Aitkenfon* attended the assizes at *Newcastle*, and feed counsel upon the trial, &c.

5to, Mr *Aitkenfon* stated a case about the honorary freemen as to their right of voting, and sent it to the Lord *Galloway* when in *London*, and his Lordship took the opinion of counsel thereon; which state and opinion will be produced, if thought material. This case was done with a view to serve Lord *Gairlies*, in case his election could not be carried without striking off the honorary freemen.

6to, The pursuer, on this head, must likewise beg leave to charge, as an article of employment *qua* attorney, the receipt of three score letters, which were wrote to him by the defenders in their proper business of that election, and answered by Mr *Aitkenfon*, as attorney employed by them.

And, lastly, The trouble in preparing for, and upon the day of taking the pole; when Lord *Gairlies*'s voters were put and kept under the care of Mr *Aitkenfon*, and let out one by one to the poll, while other attorneys were necessarily employed to attend to the execution of that plan previously prepared by Mr *Aitkenfon*.—These particulars, and many others, will come out upon the proof.

As, therefore, in the question of relevancy there can be no doubt entertained of all and each of these particulars, and that Mr *Aitkenfon* further was employed to canvass and object to the votes on the opposite side, as well as support those of Lord *Gairlies*, it is submitted if they are not sufficient to intitle the pursuer to a proof of his libel. It is apparent to any person versant in these matters, that all and each of the above parts of business could not be transacted *in puncto temporis*. From the variety of incidents, as well as the nature of the thing, (and both in some measure are proved from the correspondence above mentioned), it must have happened, that they would, as in reality they did, arise in constant succession, as
either

either party had more or less hopes of success. It is an invidious step, even in elections, to accumulate distress upon unhappy debtors; but as it is one of the engines to work out the point in view, measures are always taken to disappoint its end. And here your Lordships will perceive in what a vast scene this attorney had to act. Not only the lesser matters of the burough, with respect to the electors, who had *personæ standi*, but likewise to ransack the goals, and to resort to all the courts, ecclesiastical, civil and criminal of the country. These employments have been averred by the pursuer, without exaggeration, to have engaged the whole of Mr *Aitkenson's* time, hourly and daily, from his first employment at *Kelfo* to the day of election, and even for some time thereafter, to the day of his death; and the relevancy of them is humbly submitted.

After having thus stated the condescendence, in as particular a manner as can be done at present, the petitioner will beg leave to make short observations on the defences above mentioned. And as to the *first*, denying the employment as attorney; and to the *second*, that no recompence is due to a *negotiorum gestor*; it is answered, that the first shall be proved; and the second is out of the question, as the libel is laid upon an express employment and commission.

And, as to the *third*, that Mr *Aitkenson* acted from public spirit, and on an independent footing; it shall be observed, that Mr *Aitkenson* had no connection or acquaintance with Lord *Gairlies*. He had no fortune, to make him stand on an independent foot. He was no freeman intitled to a vote in *Morpeth*. He could have no motive to support Lord *Gairlies's* interest against the *Carlisle* family and the whole country, to provoke those with whom he was to live, and from whom he was to expect employment and a livelihood: But one, that being employed as attorney by Lord *Gairlies*, no noble lord or gentleman of the county could reasonably find fault with his conduct, as he was acting openly and fairly in a branch of his business, for the support of himself and his family. While he acted

acted in this proper sphere, it was impossible he could incur the resentment of any, or thereby have found any difficulty or objection against employing him in the more ordinary parts of his business. But to have acted the volunteer, would have been the height of madness and folly, attended with all the inconvenience above mentioned, and the ruin of him and his family, which Mr *Aitkenson* was too quick-sighted and wise not to foresee. Add to these, that the business he was employed in is an usual branch of business, which no attorney in the burrough or neighbourhood where he resides, would reject or refuse; and therefore there can be no ground, contrary to reason, and the nature of business, to presume that he acted solely from a public and independent spirit, and not merely with a view of a just and adequate recompence, to which his future practice, his fortune and family, made it necessary to attend.

It was mentioned as a circumstance on this point, 1^{mo}, That no accounts had been kept by Mr *Aitkenson*; and, 2^{do}, That Lord *Galloway*, in one of his letters, says, that in the event of a disappointment, his Lordship expected the money advanced would be returned.

But it is humbly submitted if these points ought to have any weight: For it has already been observed, that it is not usual to make an article in an account for agency of this nature. 2^{do}, He therefore relied on the high opinion he had of the defenders, and followed the ordinary tract, and could not have kept a particular journal of business in his books without writing continually; for the defenders business was hourly and daily for twelve months. 3^{tio}, Although, for this reason, no journal has been kept in his books, yet he might thereafter have made them up, when his agency was at an end; but being still employed by Lord *Gairlies* till the time of his death, and the accounts not settled, it is no great wonder that his administrator found them imperfect, far back, and not brought up to the time of quitting his agency.

And as to the observation on Lord *Galloway's* letter, it is
founded

founded upon that of the 10th of *June* 1760, where his Lordship writes, after giving orders to draw for *L. 300*. " Yet I expect " that the money will be so laid out, that in the event of a dis- " appointment it will be returned; *I mean the greatest part* " of it." This, in the petitioner's apprehension, strongly sup- ports the claim for a recompence. His Lordship, in the 13th page of the Information, argues strongly and constitutionally against a fee or reward given to an elector, as inconsistent with a free election. This lesser part of the *L. 300*. therefore, which his Lordship proposes to be retained by Mr *Aitkenson*, in case of a disappointment, could be intended for no other purpose, than in payment to Mr *Aitkenson* for the trouble in the busi- ness in which he was employed, the surplus being returned to Lord *Galloway*, after full payment thus made to his attorney.

And as to the *last* defence, founded on the fitted account by the pursuer with Earl *Galloway*, supported by the decision of the 5th of *January* 1683, they do not, with great submission, apply to the case in hand.

For it is not a general account or discharge, but an account of special articles, and a particular discharge only of these ar- ticles, which cannot extend beyond the articles discharged, especially when done by an executor or administrator. And as to the decision, the fact was this: *Graham* pretending to be chamberlain, after he was discharged of his chamberlain ac- counts, pursued the executrix for many years salary *qua* cham- berlain. " It was alleged for the defender, that the pur- " suer was only *negotiorum gestor*; and unless paction were pro- " ven, the time of the entry to his service, he could not pur- " sue the representatives of the defunct for a salary, after the " chamberlain accounts were fitted by the defunct, and a dis- " charge granted to the pursuer. The Lords sustained the de- fence, and assailed the defender." It is therefore very evident, that both the fact, and the reason of the decision, are entirely out of the present question.

To conclude, the petitioner shall further observe, from Lord
Bankton,

Bankton, B. I. tit. 18. § 2. where, after observing, from the civil law, that mandates were gratuitous, yet it was lawful to agree for a reward; he then lays down the general principle of the law of Scotland: "A gratification is now generally allowed by the Lords of Session, where it does not appear the service was intended to be gratuitous; *it being reasonable that persons be rewarded for their pains.* And this practice is conform to the custom of other nations." And cites *Voet*, who, § 2. *f. mandati*, after taking notice that "Procuratores ad lites, etiam non promissa salaria recte petere;" he adds, "Nec ab æquitate alienum fuerit, id quoque ad negotiorum extra judicialium mandatarios porrigere, ut nempe arbitrio judicis aut viri boni honorario, *incertæ licet politionis*, pro officii præstiti modo consequantur; si modo soliti fuerunt non gratis opem aliis præbere, sed exigere operæ navatæ remunerationem." And cites *Groenewegen* and *Le-cuwen*. This principle of the law of Scotland, and practice of nations, are strong authorities in the present case, where Mr *Aitken* exercised a *munus publicum*, being appointed an attorney, and by law intitled to accept of the employment or business libelled, and had a just title to demand his fees for the same.

May it therefore please your Lordships to alter the former interlocutor, and either to find the libel and condescendence relevant, or, before answer, to allow a proof thereof, and of all facts and circumstances to support the same.

According to justice, &c.

DAV. DALRYMPLE.

